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No. 84-298

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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LAWRENCE A. SALIBRA, II,
*Petitioner,*

v.

THE SUPREME COURT OF OHIO, and
CHIEF JUSTICE FRANK CELEBREZZE,
JUSTICE CLIFFORD BROWN,
JUSTICE WILLIAM BROWN,
JUSTICE ROBERT HOLMES,
JUSTICE JAMES CELEBREZZE,
JUSTICE RALPH LOCHER,
JUSTICE A. WILLIAM SWEENEY,
*Respondents.*

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**Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION and the FEDERAL BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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*Amicus Curiae*, American Corporate Counsel Association and Federal Bar Association, support the petitioner Lawrence A. Salibra II, and respectfully request this Court to issue the Writ of Certiorari.

### INTEREST OF *AMICUS CURIAE*

This joint brief is submitted on behalf of the American Corporate Counsel Association (ACCA) and the Federal Bar Association (FBA).

ACCA is a nonprofit co poration chartered in the District of Columbia. ACCA was established in 1982 and has approximately 5,000 members. ACCA has extensive membership in all fifty states and several countries. The purpose of ACCA is to promote and improve the business and professional interests of attorneys who practice law on behalf of organizations in the private sector and who do not hold themselves out to the public for the practice of law. The Board of Directors of ACCA, by resolution, has directed the organization to work to obtain rules and procedures concerning admission to practice which aid corporate counsels' ability to manage their client's legal affairs consistent with each state's interest in maintaining high standards of competence.

FBA is a voluntary professional organization which has served the federal legal profession for over 60 years. The FBA is comprised of nearly 15,000 members and includes lawyers who are or have been in the employ of the federal government, members of the federal judiciary, and other lawyers with a substantial interest in federal law. Approximately 55% of the members are employed as civilian attorneys or administrative law judges by the federal government or are attorneys serving as members of the armed forces of the United States. The remaining members are attorneys who have professional interests related to the government. Since the federal legal community, civilian and military, totals approximately 20,000, those who are members of the FBA comprise a significant portion of that community.

The FBA's mission, as defined in its Constitution, is "to advance the science of jurisprudence," and its first stated objective is "to serve as the national representative of the federal legal profession." The FBA has an interest, therefore, in the resolution with certitude of substantial constitutional issues affecting the status of its members.

Lawyers practicing as members of corporate law departments or with the federal government make up a substantial portion of the bar. Many corporations are expanding the role of their corporate law departments, and the type of legal work performed by ACCA members is little different than that performed by attorneys in law firms. Similarly, attorneys who are employed as "in-house" lawyers for the federal government perform a full range of legal services for their governmental clients.

Both organizations maintain close contact with state bars on questions of admission eligibility and have followed closely the requirements of "practice" such as are involved in the instant case. Both ACCA and FBA contend that the Ohio rules governing admission to practice disadvantage attorneys in the public and corporate sectors. Therefore, a correct decision in the instant case is critically important to the attorneys who comprise both associations.

## JURISDICTION

The jurisdictional grounds are fully set forth in the Petition for Certiorari and need not be set forth here again in accordance with Rule 36.5 of this Court. The decision below of the Sixth Circuit affirming the district court is reported at 730 F.2d 1059.

## SUMMARY OF ARGUMENT

This Court should issue a Writ of Certiorari to review the decision below because that decision discriminates against a large class of attorneys in a manner which cannot be constitutionally defended. The decision below should also be reviewed because it affects the efficient delivery of legal services to the government and to corporations that use inside counsel.

Although states clearly have authority to regulate admission to the bar within their boundaries, that right is not unfettered. In order to pass constitutional examina-

tion, restrictions on eligibility to practice must be rationally related to an applicant's fitness and capacity to practice law.

The Court of Appeals for the Sixth Circuit has found in this case that the rule furthers the state interest in ensuring a competent bar by (1) encouraging attorneys with less than five years of practice to take the bar immediately and (2) encouraging experienced attorneys to practice within the State of Ohio. To the contrary, however, the rule has neither of these effects. Instead, it operates to impede the ability of corporate and government attorneys, whose fitness or competency are not questioned, to become members of the Ohio bar.

Federal attorneys have a national practice of law which takes them into many state and federal jurisdictions across the country. Similarly, corporations are, with increasing frequency, handling much of their legal work through attorneys who are employees of the corporation. Because the nature and scope of this practice is national, local requirements, such as Ohio's, that do not directly relate to attorney fitness or competence, impair the ability of the government and corporations to have legal services provided in a cost-effective fashion. Rules such as Ohio's place a costly burden on the government and corporations which already employ qualified counsel.

## ARGUMENT

### I. THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE IT UPHOLDS A RULE WHICH RESTRICTS THE PRACTICE OF LAW BUT WHICH DOES NOT RELATE TO AN APPLICANT'S COMPETENCY OR FITNESS TO PRACTICE LAW.

It is well established that professional licensing procedures of a state will be deemed constitutional only if those procedures are rationally related to a valid state objective. As Mr. Justice Black, in defining that valid state objective, wrote in his majority opinion in *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957):

> A state can require high standards of qualification, such as good moral character, efficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Id.* at 239.

In the instant case, the state has imposed requirements that, when applied to government or corporate counsel, are neither reasonable nor rationally related to a valid state objective. The irrationality of the Ohio Rule is best demonstrated by examining the rule and the decision below.

Rule I, Section 9(A)(e) of the Supreme Court Rules for the Government of the Bar of Ohio, requires that an applicant for admission to the bar without examination show evidence that he or she, while a nonresident, has engaged in legal work as a member of a state bar outside the State of Ohio for at least five years. Attorneys may practice law in the State of Ohio without being members of the Ohio Bar if they register with the Ohio Supreme Court under Rule VI of that court. Rule VI requires a certification of registration by attorneys who practice exclusively for a specific employer. The certificate of registration does not limit the type of work that might be

done by such attorneys but merely limits the attorney to representing the identified employer.

Petitioner passed the Wisconsin bar examination in 1972, is a member of the Wisconsin, Illinois, and New York bars, and has practiced law in Ohio since 1976 by maintaining his certification with the State Supreme Court. His practice has been exclusively for his corporate employer and has taken him into many state and federal courts across the country.

Under the Ohio Rule, then, petitioner is ineligible for admission to the bar without examination solely because he lives in Ohio. This is true even though much of the legal work he has performed has not been conducted within the State of Ohio. The impact of a rule which refuses to credit legal work performed while a resident of Ohio is felt primarily by corporate and federal attorneys who happen to reside in the State of Ohio but who have multistate legal responsibilities for a single employer.

An examination of the decision below does not show how the Ohio bar rules advance a legitimate state interest. The court merely asserts that there is a rational basis for the Ohio Supreme Court's distinction between legal work performed by Ohio residents and nonresidents. Beyond making these assertions, however, the court does not attempt to explain why the choice of residence or place of employment has any impact on fitness or competency.

Certainly the distinction between practice inside and outside the State of Ohio cannot be justified on the basis of guaranteeing attorney competency or fitness. The petitioner has registered with the Ohio Supreme Court pursuant to Rule VI. The Ohio Supreme Court has full authority to discipline him should the necessity arise. Moreover, the certification of registration does not limit in any way the type of work that may be performed under

the certification process. Instead, it merely addresses the question of for whom the legal services may be performed.

The purpose of the bar examination is to judge competency. The State of Ohio has made the decision that an attorney practicing *outside* the state borders for a five-year period is presumed competent to practice in Ohio without examination. Likewise, the state has determined that an attorney who has resided *inside* the State of Ohio and practiced under the special certification procedures, cannot be presumed competent and, therefore, must sit for an examination. No attempt is made by the state to assert that the kind of legal work performed by corporate or government attorneys registered with the Ohio Supreme Court under Rule VI is any different from or is of less quality than that performed by other lawyers wishing to obtain admission in the state bar on motion.

Since the state does not articulate differences which relate to competency between the legal skills of attorneys who practice in-state under the certification procedures, and attorneys who practice outside Ohio, the same admission standards should apply to both groups of attorneys. It is constitutionally necessary that both be treated in like fashion. Either both should be required to take the bar examination or both should be allowed credit for legal work performed, regardless of where that work is performed.

The irrationality of the Ohio Rule is highlighted by the fact that it does *not* require that the five years of legal work must be done in the state in which the applicant is admitted. The Ohio Rule only requires that the work not be done while a resident of the state. In other words, had the petitioner gone to work for a corporation outside Ohio, even though in a state in which he was not admitted to the bar, he could now be admitted in Ohio

without examination. This result is patently absurd and does nothing to further the state interest in guaranteeing a competent bar.*

A case directly on point is *Stein v. Coleman*, 214 U.S.P.Q. 118 (W.D. Mich. 1982). That case dealt with admission requirements in the State of Michigan. The court concluded that the equal protection requirements of the Constitution were offended by the state rule which accorded patent attorneys in the state different treatment from those outside the state when computing experience for purposes of admission without examination. According to the opinion, "this court is unable to conclude that Michigan's grant of the privilege of bar admission to attorneys who practice patent law outside the state, while denying the privilege to its own similarly situated citizens who practice within the state, is rationally related to any legitimate state purpose." *Id.* at 121.

The *Stein* court also recognized that corporate practitioners often have a national practice involving federal rather than state law questions. This is equally true for federal attorneys who often deal exclusively in federal courts with federal law and not state law. The court, in rejecting Michigan's limitation on admission as being a denial of equal protection, said (*Id.* at 120):

> The practice of patent law involves the drafting of applications, evaluating of inventions, presenting of patents, filing of amendments and appeals and arguments, in support thereof, *applying the same laws and procedures in each state of the Union.* (Emphasis supplied.)

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* This discussion addresses the inherent incongruity of Ohio's rules for admission on motion. ACCA and FBA do not support the requirements of any state which would make admission on motion turn on prior experience *only* in the state in which the applicant was previously admitted to practice, a requirement not at issue in this case.

Many corporate and government attorneys have national practices, which take them into numerous state and federal courts. As the *Stein* court recognized, and as this Court should also, a rule which does not credit much of this practice cannot be countenanced. (The *Stein* opinion was withdrawn after Michigan agreed to amend its admission rules.)

Another case of interest is *Jensen v. Murphy*, Civ. No. HM 80-608 (U.S.D.C. Md. 1980), Extracts 49 L.W. 2338. Although the *Jensen* opinion was also withdrawn after Maryland amended its rules, it is instructive because the court found the Maryland rule in violation of the Equal Protection Clause, the Privileges & Immunities Clause, and the Commerce Clause of the United States Supreme Court. The Court also articulated a four step analysis by which to gauge whether a state action is constitutionally supportable. Under the *Jensen* analysis, a violation of the Privileges & Immunities Clause (Article IV, Section 2, Clause 1 of the U.S. Constitution) exists when state action:

1. imposes upon residents and nonresidents unequal treatment
2. which directly impacts upon the interests of comity and federalism
3. where a fundamental right is involved
4. and where the discrimination does not bear a substantial relationship to the 'pecular evil' (sic) at which the state action is aimed.

Concerning the first step, a nonresident lawyer having five years of qualified legal work could be admitted to the Ohio bar without examination. Petitioner, a resident of Ohio, with at least five years of qualified legal work must take the Ohio bar examination. It is evident that the Ohio Rule imposes unequal treatment on the petitioner when compared to a nonresident attorney.

The *Jensen* court, discussing the second and third steps, correctly determined that the "practice of law" is a fundamental right which impacts the interests of comity and federalism.

The fourth step, regarding the "peculiar evil" aimed at by the Ohio Rule, is to assure that lawyers licensed to practice law in Ohio are competent, and, as found by the trial court in *Salibra*, to encourage lawyers residing in the State of Ohio to take the Ohio bar examination. It is unreasonable to assume that the petitioner's five years of unrestricted legal experience, pursuant to Ohio's Registration Rule VI, is not equivalent to a nonresident applicant's legal experience elsewhere. As to the bar examination, if a nonresident attorney, with qualifying legal experience, does not have to take the Ohio bar examination, Ohio must be understood as stating that competency of an attorney is to be measured by either passing the bar examination or by possessing qualifying legal experience outside Ohio. Legal experience while a resident of Ohio is discounted without any articulated justification. There is no credible basis on which to support such discrimination. Indeed, the final step suggested by the *Jensen* court is satisfied because the discrimination imposed on the petitioner by Ohio bears no substantial relationship to the petitioner's competence or fitness to practice law in the State of Ohio. Therefore, applying the *Jensen* analysis, Ohio's Rule is an unconstitutional state action in violation of the Privileges and Immunities Clause of the United States Constitution.

## II. THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE IT PERPETUATES UNJUSTIFIABLE DISCRIMINATORY TREATMENT OF A CLASS OF ATTORNEYS.

The rationale for the rule cited by the court below—encouraging corporate attorneys with less than five years of practice to take the bar and encouraging experienced attorneys to migrate to Ohio—does not relate to fitness

or competency to practice law and therefore cannot be used as a justification for a rule which discriminates against certain classes of attorneys.

The district court erroneouslv held that the Ohio Rule encourages corporate attorneys with less than five years of practice to take the bar examination. It is simply not the case that a federal or corporate attorney is encouraged to take the examination by a rule that waives the examination requirement. Perhaps the court was concerned that attorneys who are members of another state's bar (but with less than five years experience) would come into Ohio to practice for a corporation or the government and then go into private practice in Ohio. The court's concern for competence and fitness in those instances was misplaced. Those attorneys, like their counterparts coming in from out of state, would have passed an examination and would be members of a bar. Further, they would have been practicing law in Ohio under the direct supervision of the Ohio Supreme Court.

Under these circumstances, an argument that the Ohio Rule insures competency just does not wash. Absolutely no facts have been presented to demonstrate that attorneys practicing inside the state for a corporation or the government are less fit or competent than those practicing outside the state and that, therefore, one group should sit for an examination but the other group need not. The same standards must apply to both classes of attorneys. See *In re Griffiths*, 413 U.S. 717 (1973).

The conclusion below that the rule encourages experienced attorneys to migrate to Ohio is also without basis. Certainly, by making it more difficult for corporate and government attorneys to go into private practice in the State of Ohio, the rule reduces competition to the advantage of the local private bar. However, under *Schware*, the only legitimate reasons for denying admission are concerns about fitness and competency. Those concerns

have not been raised about either the petitioner or the class of attorneys involved. The court's rationale that the Ohio Rule is constitutional because it encourages migration of experienced attorneys to Ohio is irrelevant to the circumstances of this case.

## III. THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE IT IMPAIRS THE EFFICIENT DELIVERY OF LEGAL SERVICES TO CORPORATIONS THAT USE INSIDE COUNSEL AND TO THE GOVERNMENT.

The real effect of the lower court's decision upholding the Ohio Rule is to make it more difficult for qualified corporate and government counsel to fully and actively follow their chosen profession, to the detriment of those attorneys and their clients. The rule certainly discourages such attorneys from entering private practice. The rule also precludes them from participating in the professional activities provided by membership in a bar association. If an attorney cannot become a member of the bar association of the state in which he practices, the implication is that attorney is somehow not as professional as others.

Although that attorney can always take the bar examination, the fact remains that other attorneys no more or less competent are not required to do so for the sole reason that they happen to live on the other side of the state boundary. The result of this discriminatory treatment is to make it less attractive for competent attorneys who wish to fully participate in the professional activities afforded by bar membership to accept employment as attorneys with corporations or the government.

The Court should also recognize that the practice of corporate and government attorneys is often national in scope. Because of this national practice, military lawyers, other government lawyers and corporate attorneys often are assigned to perform legal duties outside the

states in which they have been licensed to practice. The prospect of such assignments, which depend on the needs of the government or the corporate employer, is a factor considered by lawyers who contemplate entering or remaining in the federal service or corporate employment. If, on the one hand, the lawyer who does legal work outside the jurisdiction in which licensed receives credit for the time spent in such work when seeking admission on motion to another state bar, then that attorney is not penalized for being assigned outside the state in which previously licensed. On the other hand, if this time is not credited for such purposes, the attorney is precluded from obtaining admission on motion. The practical consequence is that an attorney who leaves federal service or corporate employment through retirement or otherwise, would be prejudiced by remaining in the place of last assignment or employment if the years of practice in that jurisdiction could not count toward admission on motion to that state bar.

It appears to ACCA and the FBA that the real reason for the rule is to insulate the local bar from competition and thereby protect the economic interests of the local bar. This kind of economic restraint should not be countenanced by this Court. "Where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Restrictive bar admission requirements have been criticized by many commentators. Former American Bar Association President Chesterfield Smith has stated that "(m)any of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." *Time for a National Practice of Law Act*, 64 A.B.A.J. 557 (1978). See also Horack, *"Trade Barriers" to Bar Admissions*, 28 J. Am. Judic. Soc. 102 (1944) ("an examination of requirements for admission to the bar shows a distinct

leaning toward the protection of the . . . local lawyer with much the same effect as is created by ordinary trade barriers"). This Court has overturned protectionist trade barriers in other situations. It is time for the Court to turn its attention to the equally restrictive burdens which the Ohio Rule places on the practice of law.

## CONCLUSION

ACCA and the FBA recognize the legitimate interest of each state in assuring the fitness and competency of the attorneys who seek to become members of its bar. However, when a restriction goes beyond the state's legitimate interest and constructs a Chinese wall around the lawyers of that state, then the interests of the members of both associations are jeopardized. The restriction under attack here is clearly arbitrary, for it rests on the illogical premise that someone knows more about Ohio law by seeing it from a distance rather than close at hand. The associations support the Petition for Writ of Certiorari because of their conviction that the interests of their members and those of the public will be furthered if this Court directs a clear message to state bars and lower courts that arbitrary restrictions on bar admission cannot be tolerated. Restrictions such as those at issue deter some attorneys from federal and corporate service, punish others for serving nonetheless, and serve no valid state or public interest.

Dated this 21st day of September, 1984.

Respectfully submitted,

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